

\*E-FILED - 4/28/08\*

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DERRAN SMILEY,

No. C 08-0045 RMW (PR)

Petitioner,

ORDER GRANTING PETITIONER'S  
MOTIONS TO PROCEED IN FORMA  
PAUPERIS; ORDER TO SHOW CAUSE

v.

MIKE EVANS, Warden,

Respondent.

(Docket Nos. 3, 6)

Petitioner, a state prisoner proceeding pro se, seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254. On March 12, 2008, the court issued an order notifying petitioner that his in forma pauperis application was incomplete. On March 28, 2008, petitioner filed a second in forma pauperis application and included his trust account statement for the preceding six months. Although petitioner did not submit a certificate of funds signed by an authorized prison official, the court finds that petitioner has shown good cause to proceed in forma pauperis and will GRANT petitioner's motions (docket nos. 3, 6). The court orders respondent to show cause why a writ of habeas corpus should not be issued.

**BACKGROUND**

According to the petition, an Alameda Superior Court jury convicted petitioner of kidnaping to commit rape and five counts of forcible rape. (Cal. Penal Code §§ 209(b)(1),

Order Granting Petitioner's Motions to Proceed in Forma Pauperis; Order to Show Cause  
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261, 667.61(d)(2)). On May 16, 2006, petitioner was sentenced to forty-nine years-to-life in state prison. On direct appeal, the state appellate court affirmed the judgment and conviction on September 19, 2007. Petition, Exhibit One. The state supreme court denied a petition for review on November 28, 2007. *Id.*, Exhibit Two. Petitioner states that he filed a habeas petition in the California Court of Appeal raising a claim of ineffective assistance of counsel, which was denied on February 21, 2007. The instant federal petition was filed on January 4, 2008.

## DISCUSSION

### A. Standard of Review

This court may entertain a petition for writ of habeas corpus “in behalf of a person in custody pursuant to the judgment of a state court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a); Rose v. Hodges, 423 U.S. 19, 21 (1975).

A district court shall “award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.” 28 U.S.C. § 2243.

### B. Petitioner’s Claims

As grounds for federal habeas relief petitioner asserts that: (1) there was insufficient evidence to support the kidnap conviction and the true finding on the kidnap enhancement allegations under Penal Code § 667.61(D)(2) which deprived him of due process; (2) he was denied due process and a fair trial when uncharged conduct evidence was admitted against him pursuant to Evidence Code 1108; (3) CAL JIC No. 2.62 violated his Fifth Amendment right against self-incrimination; (4) CAL JIC No. 2.50.01 deprived him of due process by misstating the burden of proof necessary for a conviction; (5) ineffective assistance of counsel by counsel’s failure to object to the use of rape trauma syndrome evidence as substantive evidence of guilt; and (6) Evidence Code 1108 violates due process on its face and as applied to petitioner’s case.

1 Liberally construed, petitioner's allegations are sufficient to require a response. The court  
2 orders respondent to show cause why the petition should not be granted.

### 3 CONCLUSION

4 1. Petitioner's motions to proceed in forma pauperis (docket nos. 3, 6) are  
5 GRANTED.

6 2. The clerk shall serve by mail a copy of this order and the petition (docket  
7 no. 1) and all attachments thereto upon the respondent and the respondent's attorney, the  
8 Attorney General of the State of California. The clerk shall also serve a copy of this order on  
9 the petitioner.

10 3. Respondent shall file with the court and serve on petitioner, within **sixty days**  
11 of the date of receipt of this order and the petition, an answer conforming in all respects to  
12 Rule 5 of the Rules Governing Section 2254 Cases, showing cause why a writ of habeas  
13 corpus should not be granted. Respondent shall file with the answer and serve on petitioner a  
14 copy of all portions of the underlying state criminal record that have been transcribed  
15 previously and that are relevant to a determination of the issues presented by the petition.

16 If petitioner wishes to respond to the answer, he shall do so by filing a traverse with  
17 the court and serving it on respondent within **thirty days** of his receipt of the answer.


18 4. Respondent may file a motion to dismiss on procedural grounds in lieu of an  
19 answer, as set forth in the Advisory Committee Notes to Rule 4 of the Rules Governing  
20 Section 2254 Cases within **sixty days** of the date of receipt of this order. If respondent files  
21 such a motion, petitioner shall file with the court and serve on respondent an opposition or  
22 statement of non-opposition within **thirty days** of receipt of the motion, and respondent shall  
23 file with the court and serve on petitioner a reply within **fifteen days** of receipt of any  
24 opposition.

25 5. It is petitioner's responsibility to prosecute this case. Petitioner is reminded  
26 that all communications with the court must be served on respondent by mailing a true copy  
27 of the document to respondent's counsel.

Petitioner must keep the court and all parties informed of any change of address by filing a separate paper captioned "Notice of Change of Address." He must comply with the court's orders in a timely fashion. Failure to do so may result in the dismissal of this action for failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b).

IT IS SO ORDERED.

DATED: 4/21/08

  
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RONALD M. WHYTE  
United States District Judge

United States District Court  
For the Northern District of California